TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 141

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PETITIONER,

vs.

JOHN BELLSTAB, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 11, 1928

CERTIORARI GRANTED DECEMBER 12, 1928

(32,304)

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Petitioner,	Action at Law.
vs.	
JOHN REILSTAB, Judge of the United States District Court for the District of New Jersey, and the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, Respondents.	Petition.

TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT:

Your petitioner, The Delaware, Lackawanna and Western Railroad Company, respectfully shows to this Honorable Court:

I. That your petitioner is a corporation, organized and existing by virtue of the laws of the State of Pennsylvania, and is a citizen of that state.

II. That on the ninth day of December, 1920, David Ginsberg, individually and as next of friend of Harry Ginsberg, and as administrator *ad prosequendum* of the estate of George Ginsberg, deceased, brought an action at law in the Supreme Court of the State of New Jersey, in the Morris Circuit thereof, for personal injuries to the

said David Ginsberg and Harry Ginsberg, and on account of the death of George Ginsberg, for the alleged negligent acts of the agents and servants of your petitioner, in running into and upon said named parties a locomotive operated by your petitioner.

III. Your petitioner further shows that on December 28th, 1920, said cause was removed to the United States District Court for the District of New Jersey, on account of diversity of citizenship, wherein issue in said cause was subsequently joined in said action and the case duly noticed for trial.

IV. Your petitioner further shows that on December 2nd, 1921, at the September, 1921, Term of the District Court, said cause was tried and resulted in a verdict for the plaintiffs in said action, which verdict was subsequently set aside by said Court and a new trial granted your petitioner.

V. Your petitioner further shows that thereafter at the January, 1923, Term of Court, said cause was again brought on for trial and on March 3rd, 1923, the jury in said cause rendered a verdict for the defendant and that after the denial by said Court of an application by the plaintiffs for a new trial, rule for judgment final for the defendant, with costs, was entered in the said District Court on June 21st, 1923.

VI. Your petitioner further shows that thereafter, on August 2nd, 1923, plaintiffs in said action filed their assignments of error and petition for writ of error to your Honorable Court, which writ of error was allowed and said cause removed to your Honorable Court for review, and that on March 21st, 1924, the mandate of your Honorable Court, affirming the judgment of the District Court, in favor of your petitioner, was filed with and in the said District Court.

VII. Your petitioner further shows that at no time during the term at which judgment final for your petitioner was rendered in the District Court did the District Court extend said term, nor did the attorneys for the respective parties to said action stipulate or file any stipulation in the District Court, extending the term in which said judgment final was rendered, and that the said April, 1923, Term of said District Court expired on the day previous to the opening of the September, 1923, Term of said Court, which according to the statute in such cases made and provided and the rules of said District Court, commenced on the second Tuesday in September, 1923.

VIII. Your petitioner further shows that even after the mandate of your Honorable Court affirming the judgment obtained by your petitioner in the District Court came down and was filed in the District Court on March 21st, 1924, which was during the January, 1924, Term of said District Court, and which term, according to the statutes in such cases made and provided and the rules promulgated by the said District Court, expired on the day preceding the first Tuesday in April, 1924, the said plaintiffs neither extended said January, 1924, Term of said District Court, either by stipulation with your petitioner, or by any order of said Court, and that said January, 1924, Term of said District Court expired without it in any way or manner being extended, all of which facts appear from the docket entries of said District Court, a copy of which is annexed to this petition and made to form a part thereof, and is marked "Exhibit A", and the certificate of the Clerk of said District Court hereto attached are made to form a part thereof and marked "Exhibit B".

IX. Your petitioner further shows that on the first trial of said cause in the District Court, the main reason

10 why said District Court set aside the verdict rendered in favor of the plaintiffs and against your petitioner, was for and on account of certain perjured testimony given on the trial of said cause on behalf of the plaintiffs in said cause by two witnesses, one Addie Ridner and the other William Ridner.

X. Your petitioner further shows that on the second trial of said cause, which resulted in a verdict for your petitioner, your petitioner produced the said Ridners as witnesses on its behalf and, although the said plaintiffs and their attorney were well aware of the fact that said Ridners had given testimony on the first trial of said
11 cause when they appeared for the plaintiffs, which was contradictory to the testimony said witnesses gave on behalf of your petitioner on the second trial of said cause, neither said plaintiffs nor their attorney in any way or manner sought to impeach the veracity or credibility of said Ridners on the second trial of said cause.

XI. Your petitioner further shows that on March 30th, 1925, the plaintiffs in said action in the District Court filed two affidavits with the Clerk of said Court, of which true copies are hereto attached and made to form a part of this petition, being marked "Exhibits C and D", and that the William Ridner who made one of said affi-
12 davits is the William Ridner hereinbefore referred to, who was a witness for the plaintiffs on the first trial of said cause, and a witness for your petitioner on the second trial of said cause.

XII. Your petitioner further shows that on the filing of said affidavits and a notice of application to your petitioner to be made to the Honorable John Rellstab, Judge of the District Court for the District of New Jersey, said Honorable John Rellstab did on April

28, 1925, allow said plaintiffs a rule to show cause why 13
the judgment in favor of your petitioner which as hereto
fore set forth is shown to have been entered on June 21st,
1923, should not be set aside and a new trial granted, a
copy of which rule to show cause forms a part of this
petition and is marked "Exhibit E", and that your pe-
titioner at said time, to-wit, on March 30th, 1925, filed
answering affidavits, a copy of which are hereto attached
and made to form a part of this petition and are marked
"Exhibits F, G, H".

XIII. Your petitioner further shows that, pursuant to said rule to show cause allowed said plaintiffs, notice of the taking of testimony thereunder was given your pe- 14
titioner and that on May 5th, 1925, testimony was taken on said rule to show cause before the Honorable John Rellstab, and said rule to show cause was made absolute by the said Honorable John Rellstab, as is shown by his order of May 9, 1925, a copy of which is hereto attached and made to form a part of this petition and is marked "Exhibit I", although on the hearing of said testimony, the said Honorable John Rellstab recognized that the said District Court may have lost jurisdiction over the verdict rendered in favor of your petitioner and the judg ment final entered thereon on June 21, 1923.

XIV. Your petitioner further shows that it is advised 15
that the said Honorable John Rellstab, Judge of the said District Court, and said District Court, had no right or authority to disturb or set aside the verdict and judg ment entered thereon in favor of the defendant on June 21st, 1923, because the said District Court had lost juris diction of said cause, the term of said District Court in which said judgment final was rendered in favor of your petitioner having long since expired and having not been

16 extended either by stipulation between the parties thereto or any order of the Court in the premises.

XV. Your petitioner further shows that as a result of the Hon. John Rellstab granting the said plaintiffs a new trial in said matter, your petitioner will be obliged to expend large sums of money in the preparation of said cause for retrial, as said cause was a very expensive case to try, and will lose the costs of ten hundred ninety-two 35/100 Dollars ($1092.35) already awarded to it as a result of the said judgment it has already obtained against the plaintiffs in said action.

17 XVI. Your petitioner further shows that, unless this Honorable Court grants to it a stay in the premises until your Honorable Court has determined whether your petitioner is entitled to the relief prayed for in this petition, it is not only possible, but highly probable that said cause will be listed for trial and tried at the September, 1925, Term of the District Court before this Honorable Court can make a determination in the premises as to whether your petitioner is entitled to the relief prayed for.

WHEREFORE, your petitioner, The Delaware, Lackawanna and Western Railroad Company, with the aid of
18 this Honorable Court thus requesting, prays that a writ of mandamus may issue out of this Honorable Court, directing and commanding the said Honorable John Rellstab, Judge of the said District Court, and said District Court, to reinstate the judgment entered in said District Court in favor of your petitioner, or in the alternative, that a writ of certiorari be allowed your petitioner that therein may be done and corrected what otherwise contrary to the law of the land, and that a

stay of all proceedings in said cause in said District Court be granted your petitioner, until this Honorable Court has inquired into and decided the merits of your petitioner's petition.

And your petitioner will ever pray.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
By FREDERIC B. SCOTT,
Its Attorney.

STATE OF NEW YORK, }
County of New York, } ss:

FREDERIC B. SCOTT, of full age, being duly sworn, on his oath, says, that he is the attorney of The Delaware, Lackawanna and Western Railroad Company, the petitioners in the foregoing petition; that he has had personal charge of the action of David Ginsberg, *et al*, etc., against The Delaware, Lackawanna and Western Railroad Company, more particularly described and referred to in the second paragraph of the foregoing petition.

This deponent further says that he has read said petition and that the matters and things therein set forth are true.

FREDERIC B. SCOTT

Subscribed and sworn to before me this 17th day of June, 1925.

JOSEPH FIELL.
[L. S.] Notary Public No. 49
New York County
Commission expires on March 30, 1927.

22

Exhibit A.

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

DAVID GINSBERG, HARRY GINSBERG, by DAVID GINSBERG, his next friend, and DAVID GINSBERG, Administrator *ad prosequendum* of the Estate of GEORGE GINSBERG, deceased,	# 2825
VS.	At Law
DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY	Removed from N. J. Supreme Court

23

DOCKET ENTRIES

Dec	28,	1920	Copy of Proceedings filed
Jan	6	1921	Answer filed
"	7,	"	Reply filed
"	13,	"	Notice of Trial filed
Mar	19,	"	" " " "
24 Apr	4,	"	Continued for Jan Term
May	3,	"	5 subpoenas, 5 copies
Sept	12	"	Continued for April Term
Nov	1,	"	" " Sept "
"	30,	"	Trial
Dec	1,	"	"
"	2,	"	Trial Verdict for Plaintiffs, David Ginsberg $6,000, Harry Ginsberg $750 David Ginsberg, Admr $15,000

Dec.	5,	1921.	Rule to Show Cause why verdict should not be set aside and new trial granted, filed.	25
"	27,	"	Hearing on Rule to Show Cause why verdict should not be set aside and new trial granted. Decision reserved.	
"	29,	"	Memorandum filed.	
"	"	"	" "	
Jan.	4,	1922.	Order on Rule to Show Cause, &c., filed.	
"	"	"	Order denying application for new trial, filed.	
"	"	"	Remittitur filed.	
"	"	"	Rule for Judgment Final for plaintiff, for David Ginsberg, for $6,000, David Ginsberg, as Admr. $8,000, Harry Ginsberg for $750 and plaintiff's costs, filed.	26
Jan.	4,	"	Judgment Recorded.	
"	16,	"	Order extending time to file Bill of Exceptions filed.	
"	30,	"	Order extending time to file Petition, &c. for Writ of Error, filed.	
Feb.	3,	"	Petition of Defendant filed.	
"	"	"	Rule to Show Cause why verdict should not be set aside and new trial granted, filed.	
"	6,	"	Hearing on Rule to Show Cause why verdict should not be set aside. Ordered referred to John M. Emery as Special Master.	27
"	"	"	Order of Reference filed.	
"	21,	"	Order extending time to file Bill of Exceptions, filed.	
"	"	"	1 Subpoena.	
Mar.	8,	"	Order extending time to file Bill of Exceptions filed.	
"	30,	"	Order extending time to file Bill of Exceptions filed.	

34 May 5, 1925. Notice of Motion to take Testimony filed.
" " " Testimony taken on Rule to Show Cause. Ordered rule to Show Cause be made absolute.
" 11, " Order setting aside verdict and granting new trial.

UNITED STATES OF AMERICA,
District of New Jersey. } ss:

I, GEORGE T. CRAMNER, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the fore-
35 going to be a true copy of the original DOCKET ENTRIES on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Trenton, in said District, this 18th day of June nineteen hundrdsl and twenty five.

GEORGE T. CRAMNER
Clerk, District Court, U. S.
by R. S. CHEVRIER
Deputy.

[L. S.]

36

Exhibit B.

37

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

DAVID GINSBERG, HARRY GINSBERG, by DAVID GINSBERG, his next friend, and DAVID GINSBERG, Administrator *ad prosequendum* of GEORGE GINSBERG, Deceased,

Plaintiffs,

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Defendant.

Certificate of District Court Clerk.

38

I, GEORGE T. CRAMNER, Clerk of the United States District Court for the District of New Jersey, certify that a search of the records of the United States District Court for the District of New Jersey shows that neither the January, April or September, 1923, Terms of said Court, nor the January and April, 1924, Terms of the above Court, with respect to the above entitled action, were ever extended, either by any order of the above Court or by any stipulation between the above parties, or their attorneys, and filed in my office.

39

That the Terms of said Court referred to herein expired or ended at the times provided by law and the rules of said Court promulgated in accordance therewith.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Trenton in said District, this 18th day of June, 1925.

GEORGE T. CRAMNER
Clerk, District Court of the United States.
By R. S. CHEVRIER
Deputy.

[L. S.]

40 **Exhibit C.**

STATE OF NEW JERSEY }
County of Morris } ss:

SETH RIDNER, of full age, being duly sworn on his oath deposes and says that he is the son of William N. Ridner and Adeline Ridner; that in June 1920 he resided with his parents at Mill Pond; that about 1:30 o'clock in the afternoon of June 29, 1920 deponent and his father, William N. Ridner, left their home to pick cherries along the tow-path of the Canal in the direction of Kenvil from Mill Pond; deponent and his father, while walking along the tow path, had some words and deponent and his father
41 returned home without picking any cherries; then deponent took his father's pails and got the Smith boys, Ted and Charles, to accompany him while picking cherries; that deponent and the Smith boys started picking cherries in a tree along the tow-path at a point not far distant (about 1000 feet in distance) from where the Lackawanna Railroad tracks crosses the roadway leading from Wharton to Kenvil; that deponent while in the cherry tree saw the Ginsberg car enter a farm driveway almost directly opposite from the cherry tree on the other side of the Canal; Mr. Ginsberg was driving the car and one of his sons occupied the front seat with him; that one other son was in the back of the car which contained
42 either a cow or calf; that the farm driveway in question is on the first farm on the right hand side of the roadway before reaching the railroad crossing on the road leading to Kenvil; about one half an hour later deponent saw the Ginsberg car back out of the driveway and at that time Mr. Ginsberg and one son occupied the front seat while the other son remained in the back of the car with either a cow or calf; that the Ginsberg car started up the road

way in the direction of Kenvil; that the next thing 43
deponent heard was a scream, shrill whistle and a crash
all at once; that the cherry tree in question was about
fifty feet high and deponent was picking cherries near
the top of the tree and had an unobstructed view up to
the crossing; that when deponent heard the scream,
whistle and crash he saw the rear end of the Ginsberg
truck struck and turned so that the progress of the train
which had continued so that the last half of the car was
left standing on the crossing, prevented deponent seeing
what had happened to the Ginsberg car; that deponent
waited until the train proceeded on towards Kenvil and
then came down out of the tree and proceeded to the
crossing and found that the cow or calf was in the canal 44
and later hobbled up on the bank; that the Ginsberg car
was hanging over a concrete wall near the crossing the
front of the car holding it up and preventing a 20 to 30
feet drop; deponent and the Smith boys stayed there
about 15 minutes and then retraced their steps along the
towpath to the railroad Y at Wharton; that the Smith
boys proceeded home to Mill Pond and deponent went on
to Wharton to the home of his grandmother Emma
Ridner who resides Irondale road, in Wharton; that
deponent returned to his home at Mill Pond between 6:30
and 7:00 P. M. that evening; that deponent did not see
his father William N. Ridner or his mother Adeline or
Addie Ridner at the scene of the accident; that his 45
parents could not have been there because it would be
necessary for them to pass deponent on the way and that
if they were there he would have seen them but they were
no wheres in sight before or after the accident; that on
one occasion, after the accident, deponent heard his
father and mother say that they were going to be wit-
nesses for Ginsberg; that when deponent returned home
on the night of the accident June 29, 1920; Mrs. John
Smith, a next door neighbor and mother of Ted and

46 Charles Smith who were with deponent picking cherries, was in deponent's home telling deponent's mother and father about the accident; that once when Mr. Ginsberg visited deponent's home a long time after the accident and before the first trial in the Federal Court at Newark, when deponent's father and mother testified for Mr. Ginsberg, deponent told Mr. Ginsberg that he was nearby when the accident happened and had heard the scream, whistle and crash and deponent was asked by Mr. Ginsberg to come to Newark and tell what deponent knew about the accident but deponent refused to go as a witness. Mr. Ginsberg never asked deponent after that to be a witness.

47 While deponent's parents and Mrs. John Smith were discussing the accident on the night of June 29, 1920, deponent said to them "The truck is in pretty bad shape", but did not tell them that he was there at the accident and they did not ask deponent about it. Sometime after the accident, deponent did tell his parents about the accident. That deponent was present on two occasions when Mr. Ginsberg called at his home and deponent never heard Mr. Ginsberg ever ask either of deponent's parents to be witnesses for him.

I make this statement voluntarily and without any fear or threat or hope or promise or rewards of any kind whatsoever.

48 I have read this statement of five pages and it is *true*.

SETH RIDNER

Subscribed and sworn to before me this 13th day of January, 1925 } SETH RIDNER

WILLIAM A. HEGARTY,
Master in Chancery of New Jersey.

Exhibit D.

STATE OF NEW JERSEY }
County of Morris } ss:

WILLIAM N. RIDNER, of full age being duly sworn on his oath deposes and says that he resides at Kenvil, in said County of Morris; that he is married and his wife's name is Adeline; that his wife's name is also known as Addie and that eight living children resulted from said marriage; that in June, 1920 he was living with his wife and family at a place called Mill Pond in said County of Morris; that Mill Pond is located midway between Wharton and a spot where the road crosses the Lackawanna Railroad tracks and where an accident occurred on June 29, 1920; that on June 29th, 1920, he was walking with his son Seth Ridner, at about five o'clock in the afternoon and had passed over the crossing in question on his way home; that about 8 P. M. of the same date June 29th, 1920, he was informed by someone whose name he cannot recollect that an accident had happened at the R. R. crossing and that David Ginsberg of Wharton and his boys were in the accident and that they were struck by a Lackawanna train while driving their truck over the railroad crossing; that on June 30th, 1920 he visited the scene of the accident accompanied by one of his sons, either Fred or Seth; that he saw the wrecked truck on the Kenvil side of the railroad crossing; that he was at his home with his wife when news of the accident was received on June 29th, 1920 about 8 P. M., in the evening and up to that time he did not know about the accident and neither did his wife; that he was home all the time from a little after five P. M., until word of the accident had been received; that he and his wife learned about it the same time and that

52 his wife could not have learned about the accident prior to the time it was received because no communication of any kind was had with anyone outside of his immediate family until the time the neighbor gave the news at or about 8 P. M.

Some days after the accident deponent and his wife visited the grocery and butcher store in Wharton and told Mrs. Ginsberg that he was sorry for them; that some groceries were purchased and that he and his wife returned home; that up to that time he had never traded with the Ginsbergs in reference to groceries; that at various times thereafter small purchases of groceries were made by his family a the Ginsberg store; that
53 some few days after his first visit to the Ginsbergs for groceries he again went to the Ginsberg store to make a purchase and Mr. David Ginsberg learned he was in the store and Mrs. Ginsberg brought him in to see Mr. Ginsberg; that he talked about the accident with Mr. Ginsberg and expressed his sympathy for him; that at a later date deponent and his wife visited Mr. Ginsberg and volunteered to be witnesses for Ginsberg; that at the time deponent and his wife volunteered to be witnesses nothing was said to Ginsberg about money and Ginsberg never said a word about money to either deponent and his wife; that at various times thereafter deponent talked with Ginsberg either at Ginsberg's home or at deponent's home; that all during these talks Gins-
54 berg was ignorant of the fact that deponent and his wife had never seen the accident.

After Mr. Ginsberg was able to get about and was still recuperating, deponent went with Mr. Ginsberg, Mrs. Ginsberg, and a son or daughter of the Ginsbergs to the office of Senator Gebhardt at Clinton, N. J., that the trip was made by auto and Mr. Ginsberg drove the car; that the Senator was not there and inquiry as to

his whereabouts was made of the girl in the office; that 55
the party left right away; that a statement prepared
in the office of Senator Gebhardt was presented to him
for signature after the visit to Clinton; that he does
not recollect if the statement was received in the mail
or handed to him by Mr. Ginsberg, but deponent remem-
bers signing same in the house of Mr. Ginsberg.

Deponent and his wife in discussing the accident with
Mr. Ginsberg said that he heard "No whistle—no bell—
no warning of any kind prior to the crash. That it was
a misty day and the train was going 50 to 60 miles an
hour.

Shortly after the statement was signed by deponent
he accompanied Mr. Ginsberg, Mrs. Ginsberg a daughter 56
of the Ginsbergs and some man whose name deponent
does not know, to the office of Senator Gebhardt and then
to the home of Senator Gebhardt at Clinton, N. J. At
Ginsberg's request, deponent and the stranger entered
the home of Senator Gebhardt and requested of the Sena-
tor the papers in Ginsberg case; that Senator Gebhardt
said "he did not want to see him" meaning Ginsberg.
Ginsberg told deponent, a few days thereafter that he had
received the papers from Senator Gebhardt. Ginsberg
told deponent that his reason for wanting the papers
back from Senator Gebhardt was because of the fact
that Mrs. Ginsberg was always insisting that Senator
Gebhardt was no good.

After Ginsberg received the papers from Senator Geb- 57
hardt, deponent accompanied Mr. Ginsberg, Mrs. Gins-
berg and a daughter of the Ginsbergs, in an automobile
to Paterson, N. J., to visit a lawyer whom Ginsberg had
a talk with.

Just on the day of the first trial before the Federal
Court in Newark, deponent and his wife accompanied
Mr. & Mrs. Ginsberg to the office of Mr. Isadore Kalish
where a conference was held about the facts in the case.

58 Mr. Isadore Kalisch asked deponent and his wife to give their version of the case and the stories told Mr. Kalisch, at that time, were identical with that of the testimony of deponent and wife at the trial; that the stories were given voluntarily.

Some two or three months after the trial when deponent had not received anything from Ginsberg to compensate him for loss of time while going around with Ginsberg, deponent's wife showed that she was peeved and disgusted and had, without deponent's knowledge, addressed a letter to Mr. Kalisch stating that neither my husband or I have received any compensation for our time in the Ginsberg case as promised and that unless
59 something was paid at once she would make trouble for Mr. Ginsberg or words to that effect. Deponent knew that she was angry about the matter but did not know that she had written the letter until he heard it read before Commissioner Emery in Newark.

Prior to the hearing before Commissioner Emery in Newark, Seth Ely, Dover lawyer, visited the home of deponent in reference to a bill for goods from Spear & Co., Chicago, Ill., Seth Ely after discussing the bill from Spear & Co., asked deponent and his wife "if they had changed their minds about the Ginsberg case" and before deponent could answer, his wife said "that's up to me". Mr. Ely then said "if you change your minds let
60 me know".

Mrs. Ridner later visited the office of Mr. Ely at Dover and made a statement in reference to the Ginsberg case. Deponent was told of the statement by Mr. Ely while deponent was working for Mr. Ely on his farm near Rockaway. Mr. Ely told deponent that Mrs. Ridner had changed her testimony and was ready to so testify and wanted to know if deponent would do likewise and deponent said he would. Deponent was employed by Mr. Ely two weeks and had never worked for him before or

since. Mr. Ely after telling deponent about the state- 61
ment made by deponent's wife, took deponent from the Ely farm to Mr. Ely's office at Dover. The statement of deponent's wife was then read to him, a similar one was prepared and deponent signed same in Mr. Ely's office and the effect of the contents of said statement was that deponent did hear a warning—did hear a bell, did hear a whistle.

That as far as deponent's knowledge is concerned the bill of Spear & Co., was never paid for by him and he cannot say if his wife ever paid it. At any rate, deponent never heard any more about the Spear & Co., bill and the goods were never taken away.

Deponent further states at no time did Mr. Ginsberg 62
ever offer anything to deponent or his wife and that so far as Mr. Ginsberg is concerned and at no time during my talks with Mr. Ginsberg did Mr. Ginsberg ever suggest that deponent and his wife should testify to anything but the truth and up to the present day Mr. Ginsberg is still ignorant of the fact that deponent and his wife never saw the accident.

Deponent further states that this statement is made voluntarily without any promise or threat or hope of reward of any kind whatsoever.

I have read this statement of Eight Pages and it is true, William N. Ridner.

WILLIAM N. RIDNER. 63

Subscribed and sworn to before me this 12th day of January, 1925.

WILLIAM A. HEGARTY,
Master in Chancery of New Jersey.

64 **Exhibit E.**

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

DAVID GINSBERG, HARRY GINSBERG, by DAVID GINSBERG, his next friend, and DAVID GINSBERG, administrator *ad prosequendum* of the Estate of GEORGE GINSBERG, deceased,
Plaintiffs,

vs.

65 DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a corporation,
Defendant.

Rule to Show Cause

Application having been made in the above entitled cause, upon due notice given, for a Rule to Show Cause, why the verdict and judgment entered in the above cause should not be set aside upon the ground of newly discovered evidence and perjury and argument having been heard thereon and the court having considered the same as well as the affidavits filed by the respective parties herein, and for good cause shown, it is on this
66 28th day of April, 1925,

ORDERED, that the said defendant show cause on the fifth day of May, 1925, before the Honorable John Bellstab, at the Post Office Building, in the City of Newark, County of Essex, and State of New Jersey, at ten-thirty o'clock in the forenoon, (daylight saving time) or as soon thereafter as counsel may be heard, why the verdict and judgment entered in the above

entitled cause should not be set aside and a new trial granted; and it is further ORDERED, that the affidavits read in support of and against this motion be filed with the clerk of this court forthwith; and it is further ORDERED, that evidence be taken in support of and against this motion before me on that day, and that a true copy of this order be served upon the defendant within 2 days of the date hereof; and that 2 days' notice of the taking of said testimony be given by the said plaintiff to the said defendant. 67

JOHN RELLSTAB,
Judge of the U. S. District Court,
District of New Jersey.

Dated March 30, 1925 68
On Motion of

Approved as to form.
F. B. SCOTT,
Attorney of Defendant.

69

70 **Exhibit F.**

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

DAVID GINSBERG; HARRY GINSBERG, by DAVID GINSBERG, his next friend; and DAVID GINSBERG, Administrator of the Estate of GEORGE GINSBERG, deceased,

Plaintiffs,

71 AGAINST

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Defendant.

Action at Law.

Application to Open Judgment.

ANSWERING AFFIDAVITS.

STATE OF NEW JERSEY, County of Essex, } ss:

FREDERIC B. SCOTT, being duly sworn, on his oath says: That he is the attorney of The Delaware, Lackawanna and Western Railroad Company, the defendant in 72 the above entitled action.

This deponent says that the above entitled action was brought against the defendant on account of an accident wherein a locomotive of the defendant came in contact with an auto-truck being driven by the plaintiff David Ginsberg, and that as a result of said collision said David Ginsberg was injured, his son George Ginsberg killed, and another one of his children, Harry, received some minor injuries. The cause was first tried in December, 1921, before the Hon. Joseph L. Bodine and a jury

sitting in Newark and resulted in a verdict of $22,500 in favor of the plaintiffs. Subsequent to the rendition of this judgment the defendant obtained a rule to show cause from the Hon. Joseph L. Bodine on the ground that the plaintiff David Ginsberg had caused two of his witnesses, Addie Ridner and William N. Ridner, her husband, to commit perjury on the trial of said cause. Judge Bodine thereafter referred the matter to the United States Commissioner John M. Emery to take testimony on said rule to show cause and report his determinations to the Court. 73

This deponent further says that as a result of the report of the said John M. Emery Judge Bodine on June 5, 1922, set said verdict aside on the ground of the perjury committed by the plaintiffs' witnesses Addie and William Ridner, and at the time he set said verdict aside he directed this deponent as an officer of the Court to lay the said matter before the United States Grand Jury, which this deponent did, through the United States District Attorney for the District of New Jersey, as a result of which the plaintiff David Ginsberg was indicted by the United States Grand Jury as well as were his two witnesses, Addie and William Ridner. 74

This deponent further says that after said verdict was set aside and a new trial granted to the defendant, said cause was again noticed for trial with the result that it was tried before Honorable John Rellstab and a jury at Trenton and resulted in a verdict for the defendant, which verdict the said Judge refused to disturb by a rule to show cause, and the plaintiff thereafter reviewed said judgment in favor of the defendant by writ of error to the Circuit Court of Appeals, which Court on February 18, 1924, affirmed the judgment rendered in favor of the defendant. 75

This deponent further says that on the trial of said cause before the Honorable John Rellstab at Trenton, New Jersey, the plaintiff was represented by Harry Kalisch of

76 the firm of Kalisch & Kalisch, the plaintiffs' attorneys, he having been one of the attorneys who took an active part in part of the examination of the witnesses produced by the defendant on the hearing before United States Commissioner John M. Emery. That in the opinion of this deponent the said Harry Kalisch was familiar with the testimony of the Ridner witnesses first produced by the plaintiff as his witnesses on the trial of said cause at Newark and subsequently produced by the defendant on the examination before United States Commissioner John M. Emery.

Deponent further says that on the second trial of the above entitled cause, before Honorable John Rellstab at
77 Trenton, the defendant produced as its witnesses the said Addie Ridner and William Ridner and on the trial of said cause, well knowing that the said Addie Ridner had given different testimony on the first trial of said cause, this deponent, so that the jury trying said second cause should have the entire situation laid before it, propounded to said witness Addie Ridner the following question:

> "Q. Did the testimony that you gave at that trial with respect to the bell and whistle, was that the same as you have given today?"

to which question the plaintiffs' attorney, Mr. Harry Kalisch, objected in this form:

78 "Mr. Kalisch: Don't answer this. I object to it. I don't know whether or not he is trying to impeach his own witness or not, but I don't see what difference it makes what testimony she gave at the last trial.

"The Court: It doesn't appear so now. Of course, a court cannot assume you are trying to impeach your own witness. As the matter now stands it does not appear to be a proper question."

This deponent further says that cross-examination on the second trial of the said Ridner witnesses by the said

Harry Kalisch on behalf of the plaintiffs did not seek in 79
any way or manner to impeach their testimony on the ground that they had testified differently on the first trial of said cause when they appeared as witnesses for the plaintiffs.

Deponent further says that for reasons best known to the United States District Attorney the trial of the indictment against the said plaintiff herein, David Ginsberg has never been had, but that this deponent is informed that said cause has been set for trial by the United States District Attorney at Trenton for Tuesday, March 31, 1925, and this deponent verily believes that the present application of the plaintiff to open up the civil judgment rendered against the plaintiffs and in favor of the 80
defendant is merely a move on behalf of the plaintiffs in some way or manner to aid them in the trial of the indictment against David Ginsberg, and is not in truth and good faith an application presented to this Court with any reasonable expectation of having this Court disturb said civil judgment.

This deponent further says that annexed to this affidavit are the affidavits of William N. Ridner and of his daughter Mrs. Mary Berry, verified March 26, 1925, showing the way and manner in which the affidavit of William N. Ridner attached to the plaintiff's present application was obtained from him. In view of the fact that said William Ridner is a witness for the Government in the trial of the said plaintiff David Ginsberg for subornation 81
of perjury said affidavits of said William Ridner and Mary Berry clearly indicate that an effort is being made to interfere with the due and lawful administration of justice.

FREDERIC B. SCOTT

Subscribed and sworn to before me this 30th day of March, 1925.

HERBERT CLARK GILSON
Master in Chancery of N. J.

82 **Exhibit G.**

MARCH 26, 1925.

STATE OF NEW YORK }
County of New York }

WILLIAM N. RIDNER, being duly sworn, deposes and says; that he is 43 years of age; that he resides at Kenvil, County of Morris, State of New Jersey; that he is the husband of ADELINE RIDNER who lives at Lake Hopatcong; that he is the father of SETH RIDNER who lives with his mother at Lake Hopatcong and that he is the father of MRS. MARY BERRY, wife of ALFRED BERRY with whom he resides at Kenvil; that he now lives with his daughter
83 at Kenvil for the reason that he has been working for the Hercules Powder Co., at that place, Kenvil being 10 miles distant from Lake Hopatcong where his wife resides. He further says that the statement which he signed on the 12th day of January 1925 at the office of WILLIAM HEGARTY, Master in Chancery, at Morristown, N. J., is false and was obtained under duress and by threats by one, JACOBSON, in the interest of protecting DAVID GINSBERG. WILLIAM RIDNER further states that this man JACOBSON came to his daughter's house at Kenvil in the early part of January 1925 to talk about the GINSBERG case and asked him to make a statement. He said he was a friend of GINSBERG's
84 and wanted to keep him out of jail and that it was up to RIDNER to help him do so. This man, JACOBSON, also told WILLIAM RIDNER that if on account of his making a statement clearing GINSBERG, he RIDNER, would be sent to Jail, he JACOBSON would see that RIDNER did not go to jail but that he would go to jail for him. WILLIAM RIDNER further states that he at first refused to make the statement and that then JACOBSON threatened him and told him if he would not make a statement clearing GINSBERG, he RIDNER, would surely go to jail. This was said in the

presence of SETH RIDNER, WILLIAM RIDNER'S son and MRS. MARY BERRY, his daughter. MR. WILLIAM RIDNER further states that JACOBSON came again a few days later and threatened him and RIDNER because of his being in a weak condition from sickness got scared and went with JACOBSON to Morristown to the office of MR. HEGARTY. At this place JACOBSON dictated a statement to suit himself. JACOBSON read the statement to him, RIDNER, but as it did not contain the facts as RIDNER had stated, he, RIDNER, protested but JACOBSON paid no attention to that and said "sign this or you'll go to jail" and that he signed it. He further states MR. HEGARTY tried to get witnesses to sign their names to this statement but failed to do so and that further he, RIDNER, was not sworn as to the truth of the statement when he signed same. 85 86

This statement is made by me of my own free will and accord without threat or intimidation of any kind and without promise of reward.

I have also been advised of my rights in the premises.

WILLIAM N. RIDNER,

Sworn and subscribed to before me this 26 day of March, 1925. } WILLIAM N. RIDNER

JOSEPH FIELL,
Notary Public—New York County

[SEAL] Expires 3 30 25 87

Witness—
JNO. C. UP DE GROVE.

88 **Exhibit H.**

MARCH 26, 1925

STATE OF NEW YORK }
County of New York }

MRS. MARY BERRY being duly sworn, deposes and says: that she is 18 years old; that she is the wife of ALFRED BERRY and resides at Kenvil, Morris County, State of New Jersey. She states that some time in the early part of January 1925 a man who said his name was JACOBSON and claiming to be an insurance agent came to her house in Kenvil to see her father, WILLIAM RIDNER; that JACOBSON stated to her father that he
89 wanted him to go to Morristown and sign a statement that at the time of the accident to GINSBERG he was not there and therefore did not hear a bell ring or a whistle blow and if he would do this the case of the Government against GINSBERG would be quashed and further that if the Railroad Company was after him, WILLIAM RIDNER, he would guarantee that he would not go to jail but that if anybody went to jail he, JACOBSON, would go in her father's place. JACOBSON further said to her father that if he did not go to Morristown and sign a paper of this kind he would see that he went to jail.

This statement is made by me of my own free will and accord without threat or intimidation of any kind
90 and without promise of reward.

I have also been advised of my rights in the premises.

MRS. MARY BERRY
MRS. MARY BERRY

Sworn and subscribed to before me this 26 day of March, 1925,

JOSEPH FIELL

[SEAL] Notary Public—New York County
Expires 3-30-25

Witness
Jno. C. Up de Grove,

Exhibit I.

91

UNITED STATES DISTRICT COURT.

FOR THE DISTRICT OF NEW JERSEY.

DAVID GINSBERG, HARRY GINSBERG, by DAVID GINSBERG, his next friend, and DAVID GINSBERG, Administrator *ad prosequendum* of the Estate of GEORGE GINSBERG, deceased,
Plaintiffs,

vs.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

On Rule to Show Cause.

Order.

92

A Rule to Show cause having been allowed, why the verdict entered in the above entitled cause on March 3, 1923, and the judgment entered thereon on June 20, 1923, should not be set aside and a new trial granted upon the ground of newly discovered evidence and perjury; and the Court having heard evidence and argument by counsel, and having duly considered the same, and it appearing that on the retrial of the cause, fraud and perjury was committed by Wm. N. Ridner a witness called by the plaintiffs, the first time and by the defendant in the retrial and that said fraud and perjury on the retrial was not brought to the attention of the plaintiffs until after the Circuit Court of Appeals had decided the issue on appeal adversely to the plaintiffs and said plaintiffs having made their application with due diligence after

93

94 the said fraud and perjury were brought to their attention, it is on this ninth day of May, 1925,

ORDERED that the said Rule to Show cause be made absolute and that the verdict and judgment rendered on said cause be set aside and a new trial granted.

JOHN RELLSTAB,
Judge.

95

96

Rule to Show Cause. 97

IN THE

UNITED STATES CIRCUIT COUET OF APPEALS

FOR THE THIRD CIRCUIT.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Petitioner,

vs.

JOHN RELESTAB, Judge of the United States District Court for the District of New Jersey and the United States District Court for the District of New Jersey. 98

And now, this 13th day of July, 1925, upon consideration of the petition of the Delaware, Lackawanna & Western Railroad Company,

IT IS HEREBY ORDERED that a rule be granted on respondents herein to show cause why a writ of mandamus should not issue as prayed for in said petition; returnable on October 7, 1925, at 10 A. M. 99

Philadelphia, Pa.

Per Curiam,

BUFFINGTON,
Circuit Judge.

100 **Affidavit filed in response to Rule to Show Cause.**

UNITED STATES CIRCUIT COURT OF APPEALS.

DAVID GINSBERG, *et als.*, Plaintiffs, vs. DELAWARE, LACKAWANNA AND WESTERN RAILROAD CO., Defendant.	On Petition for Mandamus.

101

STATE OF NEW JERSEY, County of Essex, } ss.

HARRY KALISCH, of full age, being duly sworn upon his oath, deposes and says:

I am a member of the firm of Kalisch & Kalisch, attorneys of record for the plaintiff in the above entitled cause, and am and have been entrusted with the trial and appeals in said cause.

On the first and second days of March, 1923, said cause was tried before a jury in the United States District Court, District of New Jersey, at Trenton, New Jersey.

102 At said trial two certain witnesses were sworn and testified in behalf of the Delaware, Lackawanna & Western Railroad Co., William Ridner and Addie M. J. Ridner, his wife. Said William Ridner testified that the accident which is the subject of this suit occurred late in the evening between six and seven o'clock, and that he, the said William Ridner, had occasion to notice a train come up from Dover toward Chester, and that at that time he

was about fifty or sixty feet from the bridge or the tow- 103
path, and that he recollected that the said train blew a whistle and rang a bell, and the said Addie M. J. Ridner testified that on the day of the accident she was in the vicinity of the railroad crossing with her husband and that they had been out for a walk and were on their way home; that they were walking on the tow-path and that she saw a train coming up from Dover toward Chester, and that it was real late in the evening; that she noticed that the train gave bell and whistle signals and that she heard the whistle blow a couple of times, but that the bell rang until it, the train, had passed on over from where they were standing.

The jury in said cause after being unable to agree for 104
some time and remaining out over night, returned a verdict in favor of the defendant, Delaware, Lackawanna & Western Railroad Co. An appeal was then taken by the plaintiff based on certain trial exceptions, to the United States Circuit Court of Appeals, which said appeal was argued at the October Term, 1923, and the mandate of the Circuit Court affirming the judgment was entered in March, 1924.

In the month of March, 1923, I employed one Charles Whitnall, a detective, to make an investigation concerning the two witnesses, William Ridner and Addie Ridner; this was before the appeal to the United States Circuit Court of Appeals had been taken. The investigation dis- 105
closed nothing of importance and on April 15, 1924, I employed David Jacobsen to make a further investigation and said Jacobsen as a result of said investigation obtained a statement from one, William C. Smith and May Bailey. After obtaining said statement said Jacobsen continued his investigation and on January 12 and 13, 1925, succeeded in obtaining from William Ridner, who was the witness sworn in behalf of the defendant, and whose testimony is set forth, a sworn statement, and also

106 succeeded in obtaining a sworn statement from Seth Ridner, a son of the said William Ridner, a copy of which is Exhibit "C" and "D" in defendant's petition for a mandamus.

The plaintiff, David Ginsberg, is a man in poor circumstances, having been rendered so as a result of this litigation, and has been unable to pay out large sums of money in the constant employment of detectives, but has, however, himself personally made inquiries and investigations concerning the witnesses, William Ridner and Addie M. J. Ridner, which investigation has extended over a long period of time since the rendition of the verdict as above stated.

107 The statements secured and attached to this affidavit were not taken in my presence, nor were any of these statements secured as a result of my personal efforts.

That upon the presentation of the foregoing facts together with the sworn statements of said William Ridner and Seth Ridner referred to above, and upon due notice given to defendant, Judge Rellstab on the twenty eighth day of April, 1925, allowed a rule to show cause why the verdict and judgment entered in said cause should not be set aside and a new trial granted. Upon said application defendant submitted two affidavits touching upon the substantial merits of the application and nothing was then said upon the question of jurisdiction; and in allow-
108 ing said rule Judge Rellstab directed me to submit a copy of the order to defendant for his approval, which I did and defendant after making some minor changes in the order, concerning the taking of testimony under the order, returned the same to me and Judge Rellstab signed it after he also had made some trivial alterations.

The order to show cause was returnable May 5, 1925, and on that day both parties appeared by their counsel; the witnesses, William Ridner and Addie Ridner, appearing under subpoena; it being the expressed desire of

Judge Rellstab to hear both these witnesses in open court. When the matter was opened no objection was made by the defendant to the jurisdiction of the Court nor does the transcript or record show such objection until the very end of the proceedings when Judge Rellstab announced his determination to make the rule absolute; the entire matter was heard on its merits; the star witness being William Ridner; the defendant examining witnesses as well as the plaintiff, as will appear from the transcript. This said witness, William Ridner, on page 7 of the transcript testified as follows: 109

Q. Do you remember testifying as follows at the trial of Ginsberg against the Delaware Lackawanna: "While you were there did you have occasion to notice a train was coming up? A. Yes, sir. 110

"Q. And where were you at the time you noticed the train coming up? A. About fifty or sixty feet from the tow path or from the bridge.

"Q. From the bridge? A. Yes, sir.

"Q. On the tow path? A. Yes, sir.

"Q. Have you any recollection as to whether that train gave any signals either as to bell or whistle as it was approaching the crossing? A. They did blow.

"Q. They did blow? A. Yes, sir.

"Q. Have you any recollection as to whether the bell was ringing, I won't say how many times it blew, but with respect to the bell, have you got any recollection? A. Yes, the bell rang." 111

Q. Do you remember testifying that way at the trial? A. I remember something like, but I don't remember the exact words.

And on page 61, this same witness testified as follows:

Q. Where were you when this accident happened? A. I don't remember where I was.

Q. What? A. Home, I think.

112 Q. You were home and your wife was home, too, wasn't she? A. I think so.

And continuing, this witness further says at the bottom of page 61, top of page 62:

Q. At the time of the accident someone told you an accident took place down at the Kenvil Crossing, that is correct, isn't it? A. Yes.

Q. And how long after it had taken place did you go down there? A. A couple of days or so.

Q. You didn't go down before? A. No.

Q. That was the first you had seen the scene of the accident since it had happened, since the accident
113 happened? A. Yes.

And on page 89 this witness testified as follows concerning the affidavit which he made for the plaintiff and upon which the plaintiff based his plea for a new trial:

Q. In this affidavit that you made before Mr. Haggerty that said that he, meaning you, was at his home, your home, with his wife, your wife, when news of the accident was received on June 29, 1920, about eight P. M., in the evening, and up to that time he, that is you, didn't know about the accident and neither did his wife. Was that part of the affidavit false or other parts that you have reference to? A. Other parts.
114 Q. That is true, isn't it? A. Yes.

At the close of this witness' testimony the Court called both counsel and announced his determination to make the rule absolute, whereupon defendant's counsel *then* raised the question of lack of jurisdiction, and the Court formally disposed of the matter as follows:

The Court: As the matter stands before me, this application for setting aside of the verdict is founded

upon conditions that were not brought to the attention of the plaintiff until, after the Court of Appeals had decided the issue adversely to him, and as this is really a charge of fraud the application does not come too late. 115

However, if you think the Court has lost jurisdiction over the verdict rendered, you may brief that matter if you so desire.

It seems to me that without going into further testimony, there is enough disclosed by Ridner's testimony, to require the Court to make the rule absolute.

Counsel for the defendant in his affidavit attached to the petition for mandamus says: 116

"Deponent further says that for reasons best known to the United States District Attorney the trial of the indictment against the said plaintiff herein, David Ginsberg, has never been had, but that this deponent is informed that said cause has been set for trial by the United States District Attorney at Trenton for Tuesday, March 31, 1925, and this deponent verily believes that the present application of the plaintiff to open up the civil judgment rendered against the plaintiffs and in favor of the defendant is merely a move on behalf of the plaintiffs in some way or manner to aid them in the trial of the indictment against David Ginsberg, and is not in truth and good faith an application presented to this Court with any reasonable expectation of having this Court disturb said civil judgment." 117

The foregoing extract from defendant counsel's affidavit is not in accordance with the truth. Plaintiff, Ginsberg, has always been ready to stand trial, on the indictment, but for some unaccountable reason the United

States District Attorney has not seen fit to try the same. The last time the case was called for trial, which was March 31, 1925, Ginsberg appeared at Trenton with twenty witnesses which he brought from Morris County, ready to stand trial, and when the case was called I informed the Court that I was ready to proceed, but the District Attorney informed the Court that in view of the fact that a rule to show cause had been allowed in the civil suit on the ground of perjury, that the criminal suit would have to wait the outcome of the rule to show cause and that is the last time that the criminal case has been called for trial. Ginsberg is ready at any and all times to stand trial; and the reason that the District Attorney does not try the indictment is that the government, in view of the retraction of the main witness, Ridner, would be utterly unable to present its case as it is based upon the testimony of Ridner and his wife.

After all, the indictment grew out of the first trial, the verdict in which was set aside by Judge Bodine, and could have no bearing upon the case we are now considering. The indictment is only made use of by counsel for the defendant in an attempt to prejudice the mind of the Court against the plaintiff.

When plaintiff made his application to Judge Bellstab for a rule to show cause defendant submitted an answering affidavit signed by Ridner and marked Exhibit "G," in defendant's petition for mandamus. In that affidavit the following is alleged:

> "He further says that the statement which he signed on the twelfth day of January, 1925, at the office of William Hegarty, Master in Chancery, at Morristown, N. J., is false and was obtained under duress and by threats by one, Jacobsen, in the interest of protecting David Ginsberg."

When Ridner testified before Judge Rellstab on the return of the rule to show cause he gave the following testimony on pages 74 and 75. 121

Q. Do you know what "Duress" is? A. No.

Q. You don't know what that word means, do you? A. Duress?

Q. Yes. A. No.

Q. What do you mean by putting it in your affidavit here, "is false and is obtained under duress?" What do you mean by that, if you don't know what the word "duress" means. Who put that word in? A. I don't know.

and further on in the same affidavit Ridner said as follows: 122

"At this place Jacobsen dictated a statement to suit himself. Jacobsen read the statement to him, Ridner, but as it did not contain the facts as Ridner had stated, he, Ridner, protested but Jacobsen paid no attention to that and said 'sign this or you'll go to jail' and that he signed it."

before Judge Rellstab Ridner said as follows on pages 50 and 51:

Q. Did he tell you to go down and make a statement and to tell the truth? A. Who?

Q. Mr. Jacobsen, didn't he tell you that? A. Didn't he leave me? 123

Q. Answer my questions. Didn't he tell you what he wanted from you was the truth? A. Yes.

The Court: Who told you that? Who was it said that to you?

The Witness: Mr. Jacobsen.

and in the same affidavit appears the following in the handwriting of Ridner (see photostatic copy):

"I have also been advised of my rights in the premises."

124 before Judge Rellstab, Ridner testified as follows on pages 76 to 79:

Q. You don't know. You have in here "This affidavit is made by me of my own free will and accord and without intimidation." Did you use that word or didn't you? A. No.

Q. You did not? A. No.

Q. That was a word they put in? A. Somebody.

Q. Somebody. "I have also been advised of my rights in the premises." Do you know what the word "premises" means in connection with this affidavit? A. Premises?

Q. Yes. A. Living, where you are living.

125 Q. That is your idea of what that means? A. That is the way I understand it.

Q. So that when you made this statement in the affidavit, "I have also been advised of my rights in the premises," you think it means it should be this way, "I have been advised of my rights in the place I am living." That is the sense you get out of that? A. Yes.

Q. That is what you think that means? A. Yes.

Q. What do you mean by being advised of your rights, who advised you of your rights? A. What do you mean by that?

Q. Read it. That is your affidavit or a copy of

126 it. "I have also been advised of my rights in the premises." What do you mean by that? A. I don't remember.

Q. What? A. I don't remember.

Q. Did anyone advise you of your rights on that occasion? A. No.

Q. What? A. I don't remember of anybody.

Q. You don't remember anybody? What did you sign it for as an affidavit if no one advised you of your rights?

Mr. Scott: I object. That contains an unwar- 127
ranted assumption of fact. The witness says he doesn't remember it.

(Question read.)

The Court: I will allow the question.

Q. Do you understand the question? A. I don't remember what I said.

Q. What? A. What I signed it for?

Q. Yes, why did you say in your affidavit, "I have also been advised of my rights in the premises," if you were not advised of your rights? Why did you put it in there? Is it your language? A. I don't remember what I said. 128

Q. Is it your language, is that your language, what I have just read? Come, speak out. You don't need to hesitate about it. A. I don't remember——

Q. That is not your language, is it? A. No.

Q. What? A. No.

Q. Whose language is it? A. I don't know whose it is.

Q. Somebody in that office, wasn't it? A. I don't know whose it is.

Q. Whose language was it, Mr. Ridner, come and tell us the whole story? A. I don't know who it was.

I call the Court's attention to the fact that the affida- 129
vit which was made by him for the Delaware, Lackawanna & Western must have been obtained through intimidation, as it is at variance with what he testified to before Judge Rellstab, and he denies using or understanding the language contained in the affidavit.

It is to be noted that the verdict obtained by the plaintiff at the first trial was set aside upon application by the defendant upon the ground of perjury of the

same witness, and at the present trial the same kind of an application is made based upon the perjury of the same witness, and the only objection that counsel for the defendant makes upon this application is that it was not made at the term at which the verdict was rendered. He seeks through the aid of this Court to recover a judgment which is admittedly tainted with fraud and perjury.

This affidavit is made upon information and belief so far as the words and acts of other persons are concerned.

HARRY KALISCH.

Sworn and subscribed before me this twenty-sixth day of September, 1925.

LILLIAN DELTAN,
Notary Public of N. J.

Opinion denying Writ. 133

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Petitioner,

vs.

JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and the United States District Court for the District of New Jersey,
Respondents. 134

No. 3379 October Term, 1925.

On Petition for writ of Mandamus to Hon. John Rellstab, Judge of the United States District Court for the District of New Jersey. 135

Before BUFFINGTON, WOOLLEY and DAVIS, Circuit Judges.

DAVIS, *Circuit Judge*. This is a petition for mandamus to direct Hon. John Rellstab to reinstate a judgment entered in the United States District Court on June 20, 1923, which was set aside by him on May 9, 1925, after

136 the expiration of a number of terms of court without extending the term in which the judgment was entered.

On December 9, 1920, David Ginsberg individually, as next friend of Harry Ginsberg and as administrator *ad prosequendum* of the estate of George Ginsberg, deceased, brought an action against the petitioner, the Delaware, Lackawanna and Western Railroad Company, to recover damages for injuries received by him and his two sons, Harry Ginsberg, and George Ginsberg, deceased, through its alleged negligent operation of one of its trains. David Ginsberg was driving a truck in Morris County, New Jersey, on the road leading from Wharton to Kenvil. The truck was struck at a point where the road crosses the
137 track of the petitioner and the father and one son, Harry, were seriously, and the other son, George, was fatally, injured. Suit was begun in the Supreme Court of New Jersey in the Morris Circuit and was removed on the ground of diversity of citizenship to the United States District Court for the District of New Jersey.

The cause was tried on December 2, 1921, and a verdict was rendered for plaintiff. At this trial Addie N. J. Ridner and William N. Ridner, her husband, testified on behalf of the plaintiff. The jury rendered a verdict for him and against the defendant. Some time after the entry of judgment, the Ridners stated, under oath, that their testimony at this trial was false and perjured. Thereupon the judgment was set aside and a new trial ordered.
138 The second trial was held on March 3, 1923, and at this trial they testified, in accordance with their statement, that their former testimony was false; that they were about fifty or sixty feet from the crossing when the collision took place and that a whistle was blown and a bell was rung before the train reached the crossing. The jury rendered a verdict for the defendant railroad company and against the plaintiff on which judgment was entered on June 21, 1923. This judgment was brought

to this court by writ of error of plaintiff. It was affirmed 139
and the mandate from this court was filed in the District Court on March 21, 1924.

The April term of the District Court of 1923, in which the judgment was entered, expired on the opening of the September term on Tuesday, September 11, 1923. The January term of 1924 of that court, in which the mandate from this court was filed in that court, expired Tuesday, April 8, 1924. Neither of the terms of the District Court ending September 11, 1923 and April 8, 1924 was extended by stipulation, court order or otherwise.

On January 12, 1925, William Ridner signed an affidavit in which he said that he was not at or near the crossing when the collision occurred, as he had testified, 140
and that he did not know of the accident until 8 o'clock in the evening of the afternoon on which it occurred and that he was told of it by a neighbor. An application based on this affidavit was made to Judge Rellstab for a rule to show cause why this last judgment should not be set aside. He allowed the rule on April 28, 1925, and on May 9, 1925, after hearing testimony in open court, he made it absolute and set aside the judgment on the ground that it was obtained through fraud. Thereupon counsel for the defendant railroad company petitioned this court for a writ of mandamus directing Judge Rellstab to reinstate the judgment.

Two questions arise: First, whether or not we have 141
jurisdiction to issue the writ of mandamus, and, second, whether or not the District Court lost jurisdiction over the judgment with the expiration of the term in which it was entered.

The Circuit Court of Appeals is a statutory court and its authority to grant writs must be found in the statute if it exists. Section 12 of the Act creating the Circuit Court of Appeals (26 Stat. 826, 828) provides that it shall have the powers specified in section 716 of the Revised

142 Statutes of the United States. This section has been re-enacted in section 262 of the Judicial Code and provides that:

> "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

There is no statute specifically giving this court power to issue the writ of mandamus. Its jurisdiction is purely appellate and it has no power to issue the writ except in
143 aid of, or when it is necessary for the exercise of, its appellate jurisdiction. Is this writ in aid of, or necessary for the exercise of, its jurisdiction?

When the judgment was set aside, nothing was pending in this court or the District Court. The term in which final judgment had been entered in the District Court, as above stated, had long since expired without any extension of any kind. If we dismiss the rule, the case may possibly reach this court again, but if the judgment is reinstated, the case will remain final in that court and will never come into this court. The reinstatement of the judgment, therefore, cannot be in aid of the jurisdiction of this court. Accordingly, we have no power to issue
144 the writ. Tryon v. Pennsylvania Railroad Company, 213 Fed. 49; *In re* Dennett, 215 Fed. 673; Whitney v. Dick, 202 U. S. 132, 137, 138; McClellen v. Garland, 217 U. S. 268; United States v. Mayer, 235 U. S. 55.

The petitioner is seeking by writ of mandamus what can be had only by writ of error. Upon a writ of error taken after final judgment, this court may require the District Court to reverse its decision and decide a case in a particular way, but this it cannot do by mandamus. *Ex parte* Loring, 94 U. S. 165; *Ex parte* Railway Com

pany, 103 U. S. 794; *Ex parte* Hoard, 105 U. S. 578; 145
In re Pollitz, 306 U. S. 323, 331, 333; *In re* Metropolitan Trust Co., 218 U. S. 312, 319; Maryland v. Soper, 270 U. S. 9, 29.

On the second question, "in the absence of statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term". United States v. Mayer, 235 U. S. 55, 67. Whether or not the allegation of fraud in the judgment which was set aside is an exception to this rule may be a question, but be that as it may, mandamus under the facts in this case is not the legal method by which that question may 146
be determined. Therefore, the rule is DISMISSED.

147

148 **Order Discharging Rule to Show Cause.**

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

DELAWARE, LACKAWANNA & WESTERN RAILROAD CO.,
Petitioner,

vs.

149 JOHN RELLSTAB, Judge of the United States District Court for District of New Jersey, and the United States District Court for the District of New Jersey.

A rule to show cause having been allowed on the thirteenth day of July, 1925, upon consideration of the petition of Delaware, Lackawanna & Western Railroad Co., to show cause why a writ of mandamus should not issue as prayed for in said petition returnable on October 7, 1925, and Frederic B. Scott, appearing for the rule and
150 Kalisch & Kalisch, appearing *contra*, and argument having been heard thereon and the Court having duly considered the same, it is on this 25th day of September, 1926,

ORDERED that the said rule to show cause be dismissed and discharged and that said application be and the same is hereby denied with costs.

J. WARREN DAVIS,
Circuit Judge.

Clerk's Certificate.

151

United States Circuit Court of Appeals for the Third Circuit, ss:

I, SAUNDERS LEWIS, JR., Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify that the foregoing transcript of the record of the proceedings of this Court in the within entitled case is a true, correct and complete transcript of said record as the same now appears in this Court.

SAUNDERS LEWIS, JR.,
Clerk, United States Circuit Court
of Appeals for the Third Circuit. 152

153

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 13, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.